(1) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ANGELO A. PAPA,

Petitioner,

v.

DAVID FAWCETT, FRED BAKER,
ALLEGHENY COUNTY
BOARD OF ELECTORS,
and MARK WOLOSIK, DIRECTOR,
ALLEGHENY COUNTY
BOARD OF DIRECTORS.

Respondents

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, to review its judgment of June 21, 2001, at Nos. 800, 801, and 802 WAL 2000, denying allowance of appeal from the Order of the Commonwealth Court of Pennsylvania, issued December 6, 2000 at No. 3238 C.D, 1999, No. 3248 C.D. 1999, and No. 702 C.D. 2000.

PETITION OF ANGELO A. PAPA, ESQUIRE

James J. O'Connell, Jr., Esquire
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30pp

QUESTIONS PRESENTED FOR REVIEW

1. When a state trial judge dismisses a petition on its merits without affording the party the opportunity to present the merits of that petition, is it a deprivation of property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment, for the judge to award attorney's fees against both the unsuccessful petitioner and his attorney?
2. Does a trial judge violate the Due Process Clause of the Fourteenth Amendment by awarding counsel fees against a party and his attorney in the absence of any statutory authority to do so, and when the attorney has never been named as a party?

LIST OF PARTIES

The petitioner in this matter is Angelo A. Papa, Esquire. The respondents are David Fawcett, Fred Baker, the Board of Elections of Allegheny County, Pennsylvania, and its director, Mark Wolosik.

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CITATION OF OPINIONS BELOW

The opinions below are not officially reported. They are reproduced in the appendix to this petition.

BASIS FOR JURISDICTION

Section 1257(3) of title 28, United States Code, furnishes the Supreme Court with jurisdiction over this case. It provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . by writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . .the United States.

CITATION OF CONSTITUTIONAL PROVISIONS

No state shall . . . deprive any person of life, liberty, or property without due process of law.

U.S. Const. Amdt. XIV

STATEMENT OF THE CASE

This case challenges the propriety and the constitutionality of an award of attorney's fees in a lawsuit brought under the Pennsylvania Election Code. The plaintiff in the underlying action, David W. Christopher, was an unsuccessful candidate in a primary and was seeking to obtain information from the local election board that would enable him to decide if he had a basis for challenging the results of the primary. Not only was he frustrated in his attempt to obtain any public records from the election officials or from the trial court, but the court ordered both him and his attorney to pay the attorney's fees of their opponents, without affording them the chance of presenting a case on the merits, and without any predicate finding that would justify such an award by statute.

Mr. Christopher, a candidate for Allegheny County Council in the primary held on May 18, 1999, was led to suspect some irregularity in the vote count. When he could not obtain an answer on his own from the Allegheny County Board of Elections, he retained Attorney Angelo A. Papa to represent him. Attorney Papa was likewise unable to obtain the needed information from the Board of Elections to determine whether his client had a meritorious case, so he petitioned for judicial review of this refusal to cooperate. The Allegheny County Court of Common Pleas did not rule on whether Mr. Christopher was entitled to the information he was seeking. Instead, it ordered a recanvass, which was not the relief he was seeking, and would not have aided his cause.

After the recanvass, the trial judge determined that no fraud or error had been shown, dismissed the petition without hearing the merits, and awarded counsel fees to the named respondents (the successful candidate in the primary; as well as the director and members of the Board of Elections) against Mr. Christopher and Attorney Papa for alleged arbitrary and vexatious conduct and for contesting an election without probable cause, in ostensible reliance on Pennsylvania statutory law dealing

with circumstances under which such fees may be awarded.

Both, Mr. Christopher and Attorney Papa, appealed this order to the Commonwealth Court of Pennsylvania, which affirmed the order with an opinion (not officially reported) that did not address any of the irregularities in the proceedings below, but concluded summarily (and inaccurately) that all of the arguments had been ably disposed of by the Court of Common Pleas. At this point, both petitioners sought review in the Supreme Court of Pennsylvania by petition for allowance of appeal, which was denied on June 21, 2001. The Federal questions were thus never ruled on below.

REASONS FOR GRANTING CERTIORARI

If the award of counsel fees against this petitioner is allowed to stand, it will have four undesirable effects which the lower courts in this case have never recognized. These effects will be far reaching and will influence future election litigation as well as attorney-client relations and the concept of due process of law, thus going well beyond the personal interests of the parties in this matter.

The ill effects of this judgment, should it become a precedent, are as follows:

1. It will ignore the contractual, legal, and ethical obligation of an attorney to represent a client zealously, since it will declare that it is bad faith and vexatious for a lawyer to undertake to represent a client interested in challenging the procedure of the results of an election, or in obtaining public election records to evaluate a potential claim.
2. The taxing of both the attorney and the client with counsel fees will create a potential conflict of interest between every attorney and client, and will have a chilling effect on any lawyer's decision whether to accept clients in election cases.
3. Such an award will discourage the public from questioning or investigating the electoral process, and thereby will foster an environment ripe for corruption and mistake, and will frustrate the remedies now allowed by law by preventing an exercise of the right to challenge an election, or even to investigate the possibility of such a challenge.
4. Most importantly, it will establish a precedent that a court may refuse to hear the merits of a petition in an election case, and proceed instead to award attorney's fees against the litigant and against his attorney who was never named as a party and who was never given the opportunity to present the merits of his client's case, thus seriously violating due process of law.

The Pennsylvania statue relied on by the trial judge in this case, 42 P.C.S.A. sec. 2503(a), allows an award of counsel fees against a party whose conduct was

arbitrary, vexatious or in bad faith. As interpreted by Pennsylvania's highest court, these terms must be defined and limited strictly in order to avoid punishing those who bring lawsuits that are ultimately unsuccessful or that seek to develop novel theories in the law, so as not to chill the right to sue for legal harms inflicted. Thornberg v. Strause, 545 Pa. 607, 682 A2d 295 (1996). The trial judge's opinions in this case do not indicate an att mpt to curb bad faith or vexatious conduct as those terms are defined, but rather a desire to punish the petitioners for pursuing an unpopular claim and for challenging local election procedures.

The implications of such a judgment, particularly from a due process prospective, are frightening. For a court to award counsel fees against a litigant and his attorney, while denying them the information they need to evaluate their claim, or an opportunity to present a case, is a ruling that will cause any attorney or client who may ever question local election returns, to hesitate before pursuing any litigation, and perhaps even to decide against it. This would cause a chilling effect which is not what an award of attorney's fees is intended to do, and why the Pennsylvania Election Code does not allow such awards.

The record in this case indicates that the petitioner was not acting in bad faith when he sought access to the election information from its official custodians. He was seeking, in sincerity and honesty, to determine if they had grounds for challenging the results of the primary, and was pursuing the only avenue available to him to obtain that information. This cannot possibly rise to the level of bad faith or vexatious conduct.

Even more significant is the fact that the trial judge never afforded the petitioner an opportunity to present evidence in his case, but only ordered a recanvass (which he had not sought) and afterwards dismissed the case and awarded counsel fees. It should be elementary that if the trial judge did not give the petitioner a chance to present his case, he could not have concluded that whatever case he might have presented was so utterly

meritless as to be lacking in good faith. Such a tactic clearly suggests a denial of due process of law.

When the trial court's order was appealed to the Commonwealth Court, that court never considered the legal defects in the judgment as described above. Nor did it consider the broader and more disturbing due process implications of such an award, which, if allowed to stand, will establish damaging precedents and policies. It will intimidate and dissuade aggrieved parties from even questioning the results or proceedings of an election or even seeking the necessary information for such a challenge. It will also increase the difficulty experienced by such parties in retaining counsel because such counsel, if unsuccessful, may become personally liable for the other party's fees. This is not a policy that the law should favor, and if such a heavy-handed policy should ever become precedent, it would be a blatant example of deprivation of property without due process of law, in violation of the Fourteenth Amendment.

Rather than permitting the stifling of election challenges which this judgment could cause, it should be made clear that challenges to, and examinations of, the electoral system are welcomed not discouraged, in a democracy. Under Pennsylvania law, election laws are not to be used as a weapon to silence dissent, but must be administered in such a way as to aid the right of suffrage and the purity of popular elections Greenwood Township Election Case, 344 Pa 350, 25 A2d 330 (1942). In this case, only the reversal of the award of attorney's fees will serve this purpose, yet, two Pennsylvania appellate courts have refused to do so.

If this case is not reviewed on its merits and reversed, the bar will be placed in a precarious position with respect to undertaking to represent any aggrieved party in an election matter. When an attorney is retained by a client who suspects possible error or fraud in the electoral process and needs to know how to proceed, it should be perfectly proper for that attorney to seek to obtain basic information about the election in order to make a knowing and intelligent evaluation of the client's

concerns, in fulfillment of the obligation to represent the client's interest zealously. It is equally proper, if the information is not disclosed willingly, for the attorney to appeal this refusal to a court and to seek a court order compelling its release, especially when the information is supposed to be a matter of public record. If such conduct constitutes bad faith, as the trial court concluded in this case, how can any lawyer in such a position fulfill his ethical obligation to represent a client's interest?

By the same token, the practical implications of the trial court's statement that the lack of anything but a "minor discrepancy" on the record justifies the imposition of fees for bad faith is something that should not be ignored. If such a precedent is established, attorneys will not be willing to represent aggrieved parties in election matters, knowing that the case can be won only if fraud or error can be shown by the presence of significant discrepancies. Otherwise, if the discrepancies are only minor, he will lose the case and (apparently) be liable for attorney's fees. Such a precedent is completely without foundation in past or present law. It will yield dangerous results by depriving the public of counsel in election contests. Both the Commonwealth Court and the Supreme Court of Pennsylvania had the opportunity to forestall such a dangerous result, but they did not even consider this important public policy question.

The most important consideration for this Court, however, aside from the important issues of public policy raised in this case with regard to election contests, is found in the serious questions which this case raises regarding due process of law, as it relates to the administration of justice in state courts. The attorney in this case was not provided in advance with notice that he could be visited with such a sanction in a case in which he had not been named as a party. He was, therefore, unable to raise a defense which would differ from that of his client. An award imposed on both the client and the attorney, to say nothing of the jurisdictional and procedural problems it raises, has enormous potential for causing a conflict between the attorney and the client, by

making the client distrustful and placing the attorney on the defensive. When it is remembered that this petitioner made several requests to end the recanvassing, all of which were denied without a hearing, and that the trial judge never gave him a single opportunity to present a case for the relief he was seeking, thus it should be unmistakenly clear that the orders of the trial judge in awarding counsel fees were an outrageous excess of that court's jurisdiction, a dangerous attempt to stifle challenges to election returns, and a denial of due process, under the Fourteenth Amendment, to both a litigant and his attorney.[1]

All of these important considerations were presented to two appellate courts. Those courts chose not to address any of these matters, but instead rubber-stamped the trial judge, affirming his judgment without even a reference to any of these questions. Such a cursory and cavalier treatment of these serious public issues by an appellate court undermines confidence in the judicial system and leaves the inescapable impression that justice has not been done.

It should, in conclusion, be clear to this court that this case involves far more than whether the respondents should have their counsel fees paid by the petitioner. It raises serious questions of jurisdiction, public policy, and due process of law, issues which were fully briefed and argued below, but which were afforded no more than a passing mention by the lower court. Such issues deserve far more attention, and, more importantly, deserve to be

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[1] If the petitioner was not provided with adequate notice that he could be liable for attorney's fees, considering the ease with which such notice could have been given, then he has suffered a denial of due process of law under Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). Furthermore, if the petitioner was never afforded a hearing on the merits of the award of attorney's fees, then he has suffered deprivation of his property without due process of law under Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972).

addressed with authority, in particularly the claim that this petitioner has been denied due process of law by a state court. Accordingly, petitioner respectfully urges this Honorable Court to grant his petition for certiorari in this matter.

Respectfully submitted,

James J. O'Connell, Jr., Esquire
Attorney for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DAVID W. CHRISTOPHER

v. Nos. 800, 801 & 802 WAL 2000

Petition for Allowance of Appeal from Order
of the Commonwealth Court

DAVID FAWCETT, FRED BAKER, ALLEGHENY COUNTY BOARD OF ELECTIONS AND MARK WOLOSIK, DIRECTOR, ALLEGHENY COUNTY BOARD OF ELECTIONS,

PETITION OF: DAVID W. CHRISTOPHER AND ANGELO A. PAPA, ESQUIRE,

ORDER

PER CURIAM

AND NOW, this 21st day of June, 2001, the

Petition for Allowance of Appeal is denied.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID W. CHRISTOPHER
Appellant
v. NO. 3238 C.D. 1999
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY BOARD OF ELECTIONS

APPEAL OF: ANGELO A. PAPA, ESQUIRE
DAVID W. CHRISTOPHER
Appellant
v. NO. 3248 C.D. 1999
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY BOARD OF ELECTIONS

DAVID W. CHRISTOPHER
Appellant NO. 702 C.D. 2000
v. ARGUED: October 31, 2000
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY BOARD OF ELECTIONS

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE WILLIAM J. LEDERER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE LEADBETTER

FILED: December 6, 2000

David W. Christopher and his attorney, Angelo C. Papa, Esq., appeal from an award of attorneys' fees and costs to appellee, David Fawcett, by the Honorable James H. McLean of the Allegheny County Court of Common Pleas. We affirm.

This is the second time this case is before us, the first resulting in our affirmance of the trial court's order sustaining preliminary objections to Christopher's complaint in equity and petition for special relief due to lack of subject matter jurisdiction. Christopher v. Fawcett, Nos. 2205 and 2206 C.D. 1999, slip. op. (Pa. Cmwlth. Sept. 20, 1999). The factual and procedural history of this case to that point was set forth in our earlier opinion. To recapitulate briefly, this action arises out of Christopher's loss to Fawcett in an election for an at-large seat on the Allegheny County Council. Christopher filed a complaint in equity and a petition for special relief naming Fawcett, among others, as a defendant. Taking the Allegheny County Board of Elections' (Board) preliminary objections under advisement, the trial court ordered an informal review of the election results which certified that Fawcett was indeed the winner of the election. Thereafter, the trial court sustained the preliminary objections and dismissed Christopher's claims because an adequate remedy existed at law under the election code. On appeal, we granted the Board's motion to quash the equity action appeal for failure to file post trial motions and affirmed the decision of the trial court dismissing the petition for special relief.

On July 29, 1999, shortly before the trial court dismissed Christopher's action, Fawcett filed a motion for counsel fees pursuant to 42 Pa. C.S. § 2503 on the basis that Christopher's conduct in bringing the action against

Fawcett had been arbitrary, vexatious, and in bad faith. Following several hearings and the submission of briefs by all parties, the court on December 9, 1999 issued an opinion and order awarding Fawcett counsel fees in the amount of $9,795.00 against Christopher and Attorney Papa, jointly and severally. Christopher v. Fawcett, GD 99-8590 and GD 99-9171, slip op. (Allegheny C.P. Dec. 9, 1999). On December 20, 1999, Attorney Papa and Christopher filed separate notices of appeal from the court's initial order imposing sanctions, captioned as Nos. 3238 and 3248 C.D. 1999, respectively. Attorney Papa and Christopher filed separate motions for post-trial relief, which the trial court denied. Christopher v. Fawcett, GD 99-8590 and GD 99-9171, slip op. (Allegheny C.P. Mar. 8, 2000). On March 20, 2000, Christopher, again represented by Attorney Papa, filed a second notice of appeal from both the original order awarding attorney's fees and the order denying Christopher and Attorney Papa's motions for post-trial relief.[1]

In awarding counsel fees against Attorney Papa and Christopher, the trial court noted that "Petitioner and his counsel have demonstrated a blithe disregard of the specific procedural burdens which they bear under the [election] Code." Opinion of 12/9/99 at p.5. The court then outlined thirteen fundamental procedural deficiencies. Further, common pleas found that Christopher had no justification for requesting damages against Fawcett personally. On appeal, Christopher argues that Christopher and his attorney were not guilty of bad faith and vexatious conduct; that awarding attorney's fees and costs would have a chilling effect on future election

[1] Christopher also purports to appeal from a September 1, 1999 order of the trial court. However, according to the trial court docket, no September 1,1999 order was issued in this case. A memorandum opinion, urging that the trial court's order sustaining the Allegheny County Board of Elections' preliminary objections be affirmed, was issued on that date. The issues contained therein were addressed by our first opinion in this case, Christopher v. Fawcett, Nos. 2205 and 2206 C.D. 1999, slip. op. (Pa. Cmwlth. Sept. 20,1999).

challenges; that Fawcett's claimed attorneys' fees are unreasonable; and that Fawcett was not obliged to offer a defense to Christopher's claims. Upon careful review of the law and the certified record, we conclude that all of Christopher's arguments were raised before, and ably disposed of by, Judge McLean. Accordingly, we affirm on the basis of the trial court's December 9, 1999 and March 8, 2000 opinions.

Fawcett has filed a motion to dismiss Christopher's appeal, based upon numerous failures to comply with the Rules of Appellate Procedure. We note that this is a repetition of what occurred in the first appeal, wherein the prior panel cited numerous violations of the appellate rules, but nonetheless determined that it was able to conduct a meaningful review and so exercised its discretion to address the merits. For the same reason we will not dismiss the present appeal. We will, however, grant Fawcett's request for sanctions in the nature of attorneys' fees and costs.

Rule 2744 of the Pennsylvania Rules of Appellate Procedure provides that "an appellate court may award as further costs damages as may be just, including (1) a reasonable counsel fee ... if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." In the prior appeal, this court clearly explained why Christopher's claims were defective and properly dismissed, and common pleas thoroughly articulated the procedurally flawed and frivolous nature of Christopher's claims against Fawcett in support of its sanction order. Nonetheless, in this appeal, Christopher and Papa challenge the imposition of sanctions by attempting to reassert their view of the merits of the underlying claim. Moreover, as noted above, these arguments are presented in papers replete with violations of the appellate rules. These defects include failure to support factual allegations with citations to the record [Rules 2119(c) and 2132], failure to specify the manner and place in the record at which issues were preserved [Rules 2117(c) and 2119(e)], failure to include

necessary items in the reproduced record [Rules 2152-53] and failure to designate the contents of the reproduced record in accordance with Rule 2154.

Appellants' response to the last of these is illustrative. Rule 2154 provides, in relevant part, that

> [A]ppellant shall, not later than 30 days before the date fixed ... for the filing of his brief, serve and file a designation of the parts of the record which he intends to reproduce and a brief statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within ten days after receipt of the designations of the appellant, serve and file a designation of those parts. The appellant shall include in the reproduced record the parts thus designated.

Pa. R.A.P. 2154(a). Regarding their violation of the rule, appellants state that "if appellees and their counsel felt at a disadvantage by not knowing in advance which parts of the record appellants were planning to reproduce, a communication with appellants' counsel in advance of the filing of appellants' brief could have remedied that problem . .. ." Appellants' Answ. Mot. Dismiss Appeal and Req. Att'y Fees and Costs at p.3. We cannot but conclude that appellants, or at least appellant Papa, view the procedures mandated by statutes and rules of court to be suggestions which they need follow only if they so choose. We have no hesitation in finding this conduct, insomuch as it is not an isolated instance but a consistent pattern, to be obdurate and vexatious. Accordingly, pursuant to Rule 2744 we will grant the request for counsel fees as part of the allowable costs on appeal.

BONNIE BRIGANCE LEADBETTER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID W. CHRISTOPHER,
Appellant
v. NO. 3238 C.D. 1999
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY COUNTY BOARD OF ELECTIONS

APPEAL OF: ANGELO A. PAPA, ESQUIRE

DAVID W. CHRISTOPHER,
Appellant
v. NO. 3248 C.D. 1999
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY COUNTY BOARD OF ELECTIONS

DAVID W. CHRISTOPHER,
Appellant
v. No. 702 C.D. 2000
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this 6th day of December, 2000, the orders of the Court of Common Pleas of Allegheny County in the above captioned matters are AFFIRMED. Costs are taxed against appellants in the amount of $1,695.42.

BONNIE BRIGANCE LEADBETTER, Judge

Certified from the Record DEC 0 6 2000 and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID W. CHRISTOPHER
v. NO. 3238 C.D. 1999
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY COUNTY BOARD OF ELECTIONS

APPEAL OF: ANGELO A. PAPA, ESQUIRE
DAVID W. CHRISTOPHER,
Appellant
v. NO, 3248 C.D. 1999
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY COUNTY BOARD OF ELECTIONS

DAVID W. CHRISTOPHER,
Appellant
v. NO. 702 C.D. 2000
ARGUED: October 31, 2000
DAVID FAWCETT; FRED BAKER; ALLEGHENY COUNTY BOARD OF ELECTIONS and MARK WOLOSIK, Director, ALLEGHENY COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this 6th day of December, 2000, it is ordered that the caption in the opinion filed December 6, 2000, referencing docket No. 3238 C.D. 1999 only, is amended to omit the word "Appellant" after the listing of the name "David W. Christopher". In all other respects, the captions will remain as written.

BONNIE BRIGANCE LEADBETTER, Judge

Certified from the Record DEC 06 2000 and Order Exit

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID W.CHRISTOPHER,
Plaintiff,

CIVIL DIVISION
GD 99-8590
GD 99-9171

vs.

ELECTIONS

DAVID FAWCETT, FRED BAKER, ALLEGHENY COUNTY BOARD OF ELECTIONS, and MARK WOLOSIK, DIRECTOR, ALLEGHENY COUNTY BOARD OF ELECTIONS,
Defendants.

McLean, A.J. March 8, 2000

MEMORANDUM OPINION

David W. Christopher and Attorney Angelo Papa have each filed post trial motions from this Court's December 9, 1999 opinion and order awarding counsel fees in favor of David Fawcett. Mr. Christopher was an unsuccessful candidate for the office of Allegheny County Council at large in the May 18, 1999 primary election. Represented by Attorney Papa, he filed a Complaint in Equity and Petition for Special Relief against the County Elections Department and against the victorious candidate, David Fawcett personally.[1]

When this Court ruled against Mr. Christopher on September 1, 1999, he took an appeal to the Commonwealth Court. Also following that ruling, Mr. Fawcett and the County Election Department requested that the Court award counsel fees on the basis that Petitioner's conduct had been arbitrary, vexatious and in

[1] The facts and procedural history of this case are set forth more fully in this Court's previous opinions of September 1, 1999 and December 9, 1999.

bad faith pursuant to 42 Pa. C.S.A. §2503(9). Following several hearings and the submission of briefs by all parties, the Court on December 9, 1999 awarded counsel fees in favor of Mr. Fawcett, but denied the request for fees by the Elections Department.

Meanwhile, on September 20, 1999, the Commonwealth Court quashed Mr. Christopher's appeal from the dismissal of the Complaint in Equity. The Commonwealth Court also affirmed per curiam the trial court opinion regarding the Petition for Special Relief.

Mr. Papa's Post Trial Motion opposing the award of counsel fees argues that the underlying cause of action against the Election Department was a good faith and meritorious effort to obtain information from a recalcitrant government agency. For several reasons, these arguments are not persuasive. First the merits of the underlying action have been ruled on by the Commonwealth Court opinion of September 20, 1999. As a matter of law it can now be said that the Complaint and Petition were without legal merit. Mr. Papa's Motion and brief consist largely of assertions that the underlying Complaint and Petition were justified. Post Trial Motions are not an appropriate forum to mount a collateral attack on the Court's substantive rulings, especially where those rulings have already been affirmed on appeal. No award of counsel fees was made to the Election Department. Therefore, even assuming that Petitioner had a right to proceed against the Election Department, this fact would not undermine the propriety of the counsel fees awarded to Mr. Fawcett.

Though the opinion of December 9, 1999 expressed serious reservations about the conduct of the case as a whole, the actual award of counsel fees was made on the basis that David Fawcett had been personally named as a defendant. However vigorously Mr. Christopher and Mr. Papa may maintain that they had a right to sue the Election Department under the Elections Code, the Code contains no authority whatsoever for the unorthodox tactic of joining the victorious candidate personally. In fact the Code expressly provides that candidates need not

be joined in an election challenge. 25 P.S. §§3262,3456-57,3460. Mr. Papa has tried to evade responsibility for his own actions by maintaining that Mr. Fawcett's involvement was "purely ancillary," that he was named solely as an indispensable party, and that he had no reason to defend the action. However, a party cannot be simultaneously indispensable and ancillary. Quite simply, a named defendant has a reason to defend, especially where, as here, the Complaint demands money damages.

The Court cannot accept that the award of counsel fees in this case will in any way chill or inhibit the right of any person to mount a legitimate challenge to any improper action by the Board of Elections. The inclusion of Mr. Fawcett as a defendant and the demand for personal damages is completely without legal basis, and is sufficiently outrageous to support an award of counsel fees. The amount of fees awarded to Mr. Fawcett is well supported by evidence of record in this two hearings held on this issue, and the post trial motions provide no basis to challenge the amount.

In Mr. Christopher's Motion and brief challenging the award of counsel fees, he points out that he as a layman relied on Mr. Papa's superior understanding of election law in determining how best to present the case. As to the conduct of the case against the Election department Mr. Christopher may have a point yet the inclusion of David Fawcett as a defendant was so gross a breach of procedure that counsel fees are justified. Even a layman should understand that an individual cannot be hauled into court for no reason, and Mr. Christopher admitted in his testimony at the hearing on counsel fees that he had no cause of action against Mr. Fawcett. Furthermore, though he is a layperson, Mr. Christopher is an astute politician, and experienced in dealing with lawyers and litigation. It is not expecting too much to require him to refrain from joining an innocent party to a lawsuit.

Because no legal fees were awarded to the Election Department, the merit of the case against the Election Department is not relevant to this post trial motion. In

any event, the merits of that case have already been ruled upon by the Commonwealth Court The mere inclusion of Mr. Fawcett as a defendant, in the absence of any allegation of wrongdoing on his part, is sufficient to award counsel fees on his behalf, and the overbroad, scorched earth tactics employed by Mr. Papa and his client in pursuing the meritless claim only serve to further justify the award of counsel fees in favor of Mr. Fawcett.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

DAVID W. CHRISTOPHER,
Plaintiff,

CIVIL DIVISION
GD 99-8590
GD 99-9171

vs.

ELECTIONS

DAVID FAWCETT, FRED BAKER, ALLEGHENY COUNTY BOARD OF ELECTIONS, and MARK WOLOSIK, DIRECTOR, ALLEGHENY COUNTY BOARD OF ELECTIONS,

Defendants.

ORDER OF COURT

And now, this 8th day of March, 2000, it is Ordered that the Post Trial Motions filed by Attorney Angelo Papa and by David W. Christopher challenging the award of counsel fees to Defendant David Fawcett in the above captioned action are hereby denied.

BY THE COURT:
McLean, A.J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DAVID W. CHRISTOPHER,
Plaintiff,

CIVIL DIVISION
GD 99-8590
GD 99-9171

vs.

ELECTIONS

DAVID FAWCETT, FRED BAKER, ALLEGHENY COUNTY BOARD OF ELECTIONS, and MARK WOLOSIK, DIRECTOR, ALLEGHENY COUNTY BOARD OF ELECTIONS,

Defendants.

McLean, A.J. December 9, 1999

MEMORANDUM OPINION

Petitioner David W. Christopher was an unsuccessful candidate for the office of Allegheny County Council at large the May 18, 1999 primary election. Though early unofficial returns showed Mr. Christopher as the likely winner of the race. Mr. Fawcett rebounded to win by several hundred votes. On June 7, 1999 Mr. Christopher, represented by Attorney Angelo Papa, filed a Complaint in Equity and Petition for Special Relief claiming that numerous unspecified improprieties had occurred in the Elections Division's handling of the county council race. These cases named as defendants not only the County Elections Division and its Director Mark Wolosik, but also the victorious candidate, Mr. Fawcett, and a third candidate, Fred Baker. In addition to requesting that the election returns be recanvassed and the election set aside, the Complaint and Petition sought money damages against all Defendants.

Early in the case Mr. Baker was unofficially dropped from the action. However. Mr. Fawcett, whose council seat was at risk as a result of the election

challenge, brought Preliminary Objections to the Complaint and Petition, requesting that they be dismissed based on numerous instances of noncompliance with Election Code procedures, Mr. Christopher then filed an Amended Complaint and Petition which cured some but not all of the procedural defects raised in the preliminary objections.

On July 15, 1999 a hearing was held in the matter, after which the Court took under advisement the preliminary objections pending the results of an informal review of the election results by the Elections Division. The Court stressed that this review process was not a statutory recount or recanvass but was ordered solely for the purposes of clarifying the election results. The results of the review were announced in open court on July 30, 1999, and revealed only minor discrepancies from the previous official returns.[1] The Court thereafter sustained the Preliminary Objections and dismissed the Complaint and Petition, resulting in an appeal to the Commonwealth Court by Mr. Christopher.

On September 20, 1999, in an unreported memorandum opinion, the Commonwealth Court ruled on Mr. Christopher's appeal, quashing the appeal concerning the Complaint in Equity due to Mr. Christopher's failure to file a motion for post trial relief with the trial court. As to the Petition for Special Relief, the Court affirmed per curiam the trial court's opinion dismissing the case. The Court also noted several instances in which Mr. Christopher failed to comply with specific requirements of Commonwealth Court procedure:

> We note that Christopher has failed to comply with our Rules of Appellate Procedure, specifically Rules 2111 (BRIEF OF THE APPELLANT), 2116 (STATEMENT OF QUESTIONS INVOLVED). 2135 LENGTH OF

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[1] As a result of the review Mr. Christopher lost nine votes, Mr. Fawcett lost one vote, and third candidate Mr. Baker gained one vote. The net result of the review was. that Mr. Fawcett had indeed won the election by 598 votes.

> BRIEFS, 2152 (CONTENT AND EFFECT OF REPRODUCED RECORD). He has submitted a one hundred and forty-nine page brief, and has complied with none of the following requirements: a Statement of both the Scope and Standard of Review, an Order in Question, a Statement of the Case, a Summary of Argument, a Conclusion, a copy of the trial court opinion, and a Reproduced Record....

(2205 C.D. 1999,2206 CD. 1999 p. 4, footnote 4).

Immediately after the dismissal of the two actions at the trial court level, Mr. Fawcett and the Elections Division moved to recover court costs and counsel fees based on Mr. Christopher's numerous failures to comply with court procedures, and his reliance on unofficial returns to support his cause of action. Following several hearings and the submission of briefs by all parties the Court must agree that this case is sufficiently outrageous to merit an award of counsel fees to Mr. Fawcett.

The Pennsylvania Judicial Code, 42 Pa. C.S.A. §2503(9) permits an award of reasonable counsel fees when a lawsuit is arbitrary, vexatious or in bad faith.

> An opponent's conduct has been deemed to be "arbitrary" within the meaning of the statute if such conduct is based on random or convenient selection or choice rather than on reason or nature.... An opponent can also be deemed to have brought suit "vexatiously" if he filed the suit without sufficient grounds in either law or in fact and if the suit served the sole purpose of causing annoyance.... Finally, an opponent can be charged with filing a law suit "in bad faith" if he filed the suit for purposes of fraud dishonesty or corruption....

Thunberg v. Strause, - Pa.-, 682 A.2d 295,299 (1996). The Elections Code also provides for the recovery of costs in appropriate circumstances; "The Court of common pleas, upon any appeal under this section, may compel the appellant or any opposing party, other than the county board, to pay all (the witness fees, if any, or other legal

costs of the hearing, which costs may be taxed by the prothonotary in the usual manner." 25 P.S. §3157(b). Section 3469 of the Elections Code also provides:

§3469. Costs of contest if without probable cause

> (a) In contested nominations or elections of all classes, if the committee or court or judge shall decide that the complaint is without probable cause, the petitioners, and every one of them, shall be jointly and severally liable for all the costs, and the same may be collected as debts of like amount are by law collectible.

In this case, the Complaint in Equity and Petition for Special Relief set forth a staggering litany of alleged wrongdoing by the Elections Department, However, these overwrought pleadings boil down to only one salient fact: that the unofficial returns reported on the evening of the election did not comport with the official returns made public the following day. In fact, one of the items of relief requested in the Complaint and Petition is to throw out the official returns and instead adopt the unofficial returns as they stood when Mr. Christopher was still ahead. Essentially Petitioner argues that the Elections Department was negligent in failing to treat the unofficial returns as the official returns. Though the discrepancy between the returns has undoubtedly caused Mr. Christopher much consternation, there is no way that it can support a cause of action against the Elections Department. The Elections Department is not required under any circumstance to elevate the early and hastily compiled unofficial returns to the status of the official returns.

The unofficial returns are the crumb upon which Petitioner's counsel has sought to build a cause of action, and in pursuit thereof Mr. Papa has basically accused the Elections Department of being deficient in every duty, however minor or ministerial, imposed upon it by the Code. Despite this fixation on the procedural duties of the Elections Department, however, Petitioner and his counsel have demonstrated a blithe disregard of the

specific procedural burdens which they bear under the Code. Their claims were fatally deficient insofar as they:

- Were initiated by an unverified Complaint and Petition filed on behalf of the losing candidate personally;
- Ignored the verification requirements of 25 P.S. §3457 of the Election Code;
- Did not contain the signatures of three qualified electors from each election district sought to be recanvassed in violation of 25 P.S. §3154(e)(l), and §3262 of the Election Code;
- Ignored the verification requirements of each election district sought to be recanvassed according to 25 P.S. §3262;
- Failed to file a Petition in an Election Contest signed by 20 registered electors with the affidavits of five of the Petitions attached in violation of 25 P.S. §3431 and §3457;
- Failed to post bond as required by 25 PS. §3459;
- Failed to post bond or cash in a recanvass request in violation of 25 P.S. §3262(a)(l);
- Filed a Complaint in Equity when the Election Code provided an exclusive statutory remedy;
- Failed to present the Petition to the Court prior to filing in violation of 25 P.S. §3458;
- Failed to obtain leave of court before filing a First Amended Petition for Special Relief, a First Amended Complaint, and a Second Petition for Special Relief in violation of 25 F.S. §3456 and §3458;
- Moved repeatedly to terminate the court ordered recanvass despite the fact that the pleadings requested such relief;
- Failed to support their broad allegations of wrongdoing with any specific facts;
- Initiated and pursued legal action against Mr. Fawcett personally simply on the basis that he was the victorious candidate.

This course of conduct makes clear that Petitioner's counsel simply found it beneath his dignity to abide by applicable statute and rules of court while

expecting strict compliance with procedure from everyone else in the case. This double standard has led to many wasted hours and costs for the Election Department in order to defend itself against Petitioner's claims. Were the Elections Division a private sector Defendant such as Mr. Fawcett, this court would not hesitate to award costs and fees on behalf of it and it's counsel, the County Law Department. However, the Court finds that Mr. Christopher's understandable dismay at his sudden reversal in the vote count provided probable cause, however slight, for his desire to find an explanation for his loss. The Court also finds that Mr. Christopher viewed this case as a vehicle for obtaining information from the Election Department. These facts lead the Court to conclude that to assess costs in favor of the Election Department would not be quite right, especially since under §3469 the costs would be borne by Mr. Christopher as petitioner. As to attorney fees, §2646 of the Elections Code, specifies that the county solicitor's office shall receive no compensation for its representation of the county elections board. Because the Elections Department has incurred no out of pocket losses in defending this litigation they will not suffer any financial loss through a denial of attorney fees. Their stress and aggravation, though monumental, is not compensable in a motion for attorney fees.

The record amply demonstrates, however that Defendant Fawcett has incurred large legal expenses in defending against this baseless lawsuit, and justice dictates that he be compensated. At several hearings on the motion for counsel fees, Mr. Christopher and Mr. Papa admitted that the hundred and fifty dollar an hour fee charged by defense counsel were reasonable, but contended that his overall costs were exorbitant based on the fact that he was represented by not one but two attorneys. However, Mr. Fawcett's attorneys, Stephen Yakopec, Jr. and Heather Heidelbaugh submitted detailed time sheets which demonstrated a reasonable amount of time and attention devoted to this irksome litigation, and further demonstrated that no double billing had occurred.

On this subject Mr. Yakopec proved an articulate and compelling witness.

Finally, the Court is satisfied that no injustice will result from an award of counsel fees against both Mr. Christopher and Mr. Papa. Mr. Papa specializes in election law, and has litigated several election cases in Allegheny County. Thus, he has had prior experience not only with this Court but with the Allegheny County Elections Division, its director, counsel and staff. He has been chided by this court in the past for his scattershot and overbroad approach to election litigation. He has been informed by the Commonwealth Court in the case of D'Achille v. Board of Elections. NO. 137 C.D. 1998 (memorandum opinion, April 9,1998), that many of the actions which he would later repeat in this case were grounds for dismissal. In the course of this case Mr. Papa repeatedly crossed over the line from zealous advocacy of his own client into unwarranted harassment of his adversaries. The constant use of bloated yet substantively empty pleadings and briefs, unsubstantiated claims of wrongdoing and general disregard of statutorily mandated procedure amply justifies an award of counsel fees against Mr. Papa.

Though Mr. Christopher is a layman and therefore lacks Mr. Papa's knowledge of court systems and procedure, the evidence demonstrates that he is hardly a novice in terms of political experience. He has run for office in the past, both successfully and unsuccessfully, has held numerous political and social service appointments. For thirty-nine years he served in several capacities at the accounting firm of Price Waterhouse, including the managing partner of the Pittsburgh office, and the managing partner of worldwide audit practice. Following his retirement from Price Waterhouse, he served as the Chief Financial and Administrative Officer at the Pittsburgh law firm of Reed Smith Shaw and McClay. Though not an attorney, he certainly possesses considerable political acumen, as well as a sophisticated knowledge of what attorneys do and how much they are compensated. Nevertheless, Mr. Christopher chose to

institute the present lawsuit against the Election Department in the absence of any objective evidence of wrongdoing:

Q. And you never had any evidence of a vote cast for you that was improperly recorded or counted?

A. No.

Q. And there was no evidence of discrepancies in the vote count in this particular race?

A. I don't understand the question.

Q. You have no evidence of any votes that went to Fawcett that should have gone to you?

A. No, I had no evidence, correct (T., p. 63, line 23 through p. 64, line 8.)

Even accepting as absolutely true Mr. Christopher's characterization of the case as a simple effort to obtain information from the Elections Department, there is no justification for the joining of Mr. Fawcett as a defendant, and still less for requesting damages against Mr. Fawcett personally:

Q. And once again, sir, I'll give you one more opportunity, can you tell me at all under oath today how David Fawcett has caused you damage?

A. How David Fawcett has caused me damage?

Q. Yes, sir. You sued him. You sued him, sir.

A. No, I cannot sit here and say that David Fawcett has caused me damage. (T. p. 43, lines 17-24.

Without a doubt this case is arbitrary and vexatious to a degree justifying an award of counsel fees. With regard to the inclusion of Mr. Fawcett as a defendant the lawsuit can be said to have been instituted in bad faith. Mr. Fawcett has demonstrated that his counsel fees were reasonable and not duplicative, and is therefore entitled to be recompensed for his costs in defending this meritless claim.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

DAVID W.CHRISTOPHER, CIVIL DIVISION

Plaintiff, GD 99-8590
GD 99-9171

vs.

ELECTIONS

DAVID FAWCETT, FRED BAKER, ALLEGHENY COUNTY BOARD OF ELECTIONS, and MARK WOLOSIK, DIRECTOR, ALLEGHENY COUNTY BOARD OF ELECTIONS,

Defendants.

ORDER OF COURT

And now, this 9th day of December, 1999, it is Ordered that counsel fees are hereby awarded in the above captioned case against Attorney Angelo Papa and Petitioner David Christopher jointly and severally in favor of Defendant David Fawcett in the amount of nine thousand, seven hundred and ninety five dollars.

BY THE COURT:
McLean, A.J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19 day of November 2001, three true and correct copies of the foregoing Petition for Writ of Certiorari were served on counsel for the Defendants by U.S. mail. First Class, postage prepaid, addressed as follows:

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Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

(2)

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-730

ANGELO A. PAPA,
Petitioner,
v.
DAVID FAWCETT, FRED BAKER,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
and MARK WOLOSIK, DIRECTOR,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, to review its judgment of June 21, 2001, at Nos. 800, 801, and 802 WAL 2000, denying allowance of appeal from the Order of the Commonwealth Court of Pennsylvania, issued December 6, 2000 at No. 3238 C.D. 1999, No. 3248 C.D. 1999, and No. 702 C.D. 2000.

Samuel W. Braver, Esquire
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Buchanan Ingersoll
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20th Floor, One Oxford Centre
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13 pp

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COUNTERSTATEMENT OF THE CASE

This appeal arises out of an election contest. Petitioner Angelo Papa is the lawyer who initiated the action on behalf of his client, David Christopher, after Christopher lost his primary election bid for the Republican nomination to County Council for Allegheny County, Pennsylvania. Official election results showed Respondent, David Fawcett received 20,129 votes; Christopher received 19,539.

Christopher then sued Fawcett, the Allegheny County Board of Elections, and the Director of the County Division of Elections. The gravamen of Christopher's case was that the unofficial election results on election night showed him to be a narrow winner, but the official results issued shortly thereafter showed that he narrowly lost the nomination to Fawcett.

Christopher's complaint was dismissed after hearing. In the meantime, a court-ordered recanvass sought by plaintiff verified the results (net gain in Fawcett's favor of eight (8) votes) and showed no sign of wrongdoing or election irregularities. The dismissal of Christopher's complaint was upheld by Pennsylvania's Commonwealth Court. That dismissal is final and not at issue at this juncture of the proceedings.

After the dismissal of the underlying action, both the County and Fawcett petitioned the Court for an award of fees against the disappointed loser and his counsel. Mr. Fawcett's petition, insofar as it related to Petitioner, Mr. Papa, the disappointed loser's counsel, arose out of: the baseless legal positions taken by Petitioner; the admission that no factual evidence existed to support the counts in the complaint against Respondent; the numerous procedural violations committed

during the litigation; and the fact that Petitioner was pursuing invalid causes of action in the same procedurally-defective manner he had followed recently in an unrelated piece of election litigation -- litigation which contained identical claims, allegations, correspondence, pleadings and which was found by Pennsylvania's Commonwealth Court to be groundless and procedurally defective.

The Statement of the Case ("Statement") contained within Mr. Papa's Petition for Writ of Certiorari ("Petition") contains material misstatements of the procedural history of this matter, and it creates misimpressions as to what occurred in the courts below. The Statement also makes several very material omissions.

First, the Statement implies that Attorney Papa and his client were simply seeking to obtain information and directly represents that the election recanvass ordered by the trial court was not relief even sought by the plaintiff at the trial court level. This is not so. In fact, the disappointed losing candidate, through his counsel, filed a Complaint in Equity and a Petition for Special Relief against the Respondent's which did not simply seek information. To the contrary, the pleadings included a specific request for damages against Fawcett and it contained requests for recanvassings, including a request for a recanvass of all election districts within the County. (Complaint in Equity and Petition for Special Relief, Counts IV and VI (G.D. No. 99-8590).)

Petitioner's Statement also erroneously represents that the trial court awarded counsel fees to the County Board of Elections and the other defendants. This is not true. Although Allegheny County incurred the cost of conducting a recanvass and although the county law department was forced to defend against this frivolous action, the County's petition for recovery

of counsel fees and costs was denied. (12/9/99 Memorandum Opinion (per McLean, A.J.); Petition, p. 29.) The trial court only assessed the fees incurred by Fawcett, based upon a number of factors, including but not limited to the "general disregard of statutorily mandated procedures" and the fact that there was well-established proof that the Petitioner and his client had absolutely no factual or legal basis for bringing a lawsuit for damages against the winning candidate. (Id., pp. 29-30.)

Finally, throughout the Petition for Certiorari, it is claimed that the Petitioner had no notice of any request for attorneys' fees against him personally and it is implied that the award of fees against him was issued without a hearing. This is not so.

The motions for counsel fees of both the County and Fawcett specifically sought an award of fees against plaintiff and his counsel. Then, in briefs filed in support of the motion, case law and argument was submitted on this very issue -- the propriety of an award of fees against a party's counsel. Following the filing of these motions and briefs, the trial court duly set a time and place for the hearing, and a two-day hearing on the issue of attorneys' fees -- both against Mr. Papa and his client -- was held. With these filings, and in the context of clear Pennsylvania precedent wherein counsel for parties have been sanctioned and held jointly and severally liable with their clients for obdurate and vexatious conduct in cases they were handling (without a separate action being filed), Attorney Papa certainly had due notice that fees might be assessed against him personally for his litigation misconduct.

ARGUMENT

There are very good reasons to deny the pending Petition for Certiorari.

A. The Record of the Proceedings Below is Very Poor Because of Petitioner's Repeated Disregard of Procedural Rules.

It would be extremely difficult for this Court to assess the merits of Petitioner's grounds for appeal because of Petitioner's failure to properly brief this matter below and because of Petitioner's repeated disregard of procedural rules at both the trial court level and in the appellate courts below.

Pennsylvania's Election Code contains very specific procedures for complaints arising out of elections. Although the Petitioner is a lawyer with special expertise and experience in election litigation under Pennsylvania law, Petitioner repeatedly violated procedures at the trial level and on appeal.

Indeed, the trial court listed thirteen (13) specific statutory and procedural violations which it characterized as "a blithe disregard of the specific procedural burdens which [Petitioner and his counsel] bear under [Pennsylvania's Election] Code." (12/9/99 Memorandum Opinion, per McLean, A.J.; Petition, pp. 27-28.)

On appeal, the Pennsylvania Commonwealth Court also expressed a similar disdain towards Petitioner's disregard of procedures in the appeal arising out of the dismissal of Petitioner's complaint as well as the separate appeal arising out of the trial court's award of fees. The Commonwealth Court sanctioned Petitioner for this conduct, and stated as follows:

> We note that this [numerous failures to comply with the Rules of Appellate Procedure] is a repetition of what occurred in the first appeal. . .

(12/6/2000 Memorandum Opinion, per Leadbetter, J.; Petition, p. 16.) Indeed, the Commonwealth Court characterized Petitioner's filings in that court as "replete with violations of the appellate rules," and as a result had "no hesitation" in finding the Petitioner's conduct was "obdurate and vexatious" and constituted "not an isolated instance, but a consistent pattern." (Id. at p. 17.)

Among the appellate rules disregarded by the Petitioner in the appellate courts below was a failure to support factual allegations with citations to the record and a failure to specify the manner and the place in the record at which issues were preserved. (Id. at 16-17.) Because of Petitioner's failure to cite to the record, and because of Petitioner's failure to accurately summarize what occurred below, there is no "clean record" which would permit this Court to properly understand and consider the issues raised on appeal.

Further, although Petitioner now attempts to elevate this dispute to an issue arising under the United States Constitution, this was never the focus of the Petitioner's efforts below. In his brief to the Commonwealth Court of Pennsylvania, the Petitioner barely mentioned the purported deprivation of due process. He cited no case law or other authority to support his due process argument. Consequently, the appellate courts below did not discuss the due process arguments. It is respectfully submitted that this Court should not hear appeals of matters which were insufficiently and inadequately briefed by the Petitioners in the appellate courts below.

B. When Properly Stated, the Factual and Procedural History of this Matter Indicate that the Issues Raised by Petitioner are not Worthy of Being Heard by this Court.

The fundamental factual premise of Mr. Papa's Petition is the assertion that Papa, as counsel for the complainant below, had no notice that fees might be assessed against him. This assertion is not to be believed.

First, Papa omits to reveal to this Court that, approximately one year prior to the filing of this action, the Commonwealth Court issued an opinion in an unrelated election case in which he represented the plaintiff (also a disappointed loser) and made the same allegations that were repeated, virtually word-by-word, in this action. In both cases, Mr. Papa authored what the trial court characterized as "overwrought pleadings" setting forth "a staggering litany of alleged wrongdoings by the Elections Department" which were found to be baseless.

Under these circumstances, it is more than a little bit disingenuous for Mr. Papa, an attorney, to now claim a deprivation of due process after being sanctioned for initiating baseless litigation and ignoring procedural rules in exactly the same manner as he had done before. As the trial court noted,

> [Mr. Papa] has been chided by this Court in the past for his scattershot and overbroad approach to election litigation. He has been informed by the Commonwealth Court . . . that many of the actions which he would later repeat in this case were grounds for dismissal. In the course of this case, Mr. Papa repeatedly crossed over the line from zealous advocacy of his own client into unwarranted harassment of his adversaries.

> The constant use of bloated yet substantively empty pleadings and briefs, unsubstantiated claims of wrongdoing and general disregard of statutorily mandated procedure amply justifies an award of counsel fees against Mr. Papa. (12/9/99 Memorandum Opinion; Petition, p. 30.)

It is respectfully submitted that any lawyer must understand that repeated failures to follow procedures and substantive rules may lead to sanctions, including an award of attorneys' fees.

Additionally, in this case, Mr. Papa received notice that fees were being sought against him personally, because the respondents specifically requested such an award and, under well-established Pennsylvania law, an attorney may be held jointly and severally liable for fees where, for example, he knew or should have known his client's claims were without merit. E.g., In re Estate of Liscio, 432 Pa. Super. 440, 638 A.2d 1019 (1994), appeal denied 539 Pa. 679, 652 A.2d 1324.

Finally, it is absurd for Mr. Papa to assert that he has suffered deprivation of his property without due process of law because he was never afforded a hearing. Quite to the contrary, the trial court held a two day hearing on the merits of the award of the attorneys' fees.

In sum, Mr. Papa was afforded due process. He was provided with notice, a hearing and an opportunity to be heard on the issue of whether attorneys' fees should be assessed against him personally.

C. The Petition Should be Denied Because it Does Not Implicate the Reasons Outlined in Rule 10 for Granting Certiorari to a State Court Decision.

The Petition should be denied because the Supreme Court of Pennsylvania chose not to hear Petitioner's appeal. Thus, this matter does not involve a situation as described in Rule 10 of the Supreme Court Rules where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." (Rule 10(b).)

Similarly, this matter does not involve (and Petitioner has not argued that it involves) a situation where "a state court. . . has decided an important question of federal law that has not been, but should be, settled by this Court" or that conflicts with relevant decisions of this Court. (Rule 10(c).)

D. The Petition Should be Denied Because this Matter Does Not Raise Important Federal or Constitutional Concerns.

This is not a case where broad constitutional questions are implicated. More directly, this is simply a case without any factual basis in which plaintiff's counsel aggressively pursued litigation with a complete and utter disregard for statutes, rules and procedures.

That a lawyer can be sanctioned for his or her assertion of meritless positions and his or her failure to follow procedural rules is not a matter in doubt. Nor is there a split among the circuits (or any other courts) relative to this principle.

The lower courts have written well-reasoned, thoughtful opinions. Those opinions detail the numerous excesses Petitioner engaged in and indicate the sound basis for finding that Petitioner went well-beyond the duty to represent his client zealously.

Thus, for both procedural and substantive reasons, this is not a case worthy of consideration by the Supreme of the United States.

CONCLUSION

Respondent respectfully requests that the Court deny Petitioner's Petition for Certiorari.

Respectfully submitted,

Dated: 12/2/01

Samuel W. Braver, Esquire
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Attorney for Defendant,
David Fawcett

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of December, 2001, three true and correct copies of the foregoing **Brief in Opposition to Petition for Writ of Certiorari** were served on counsel for the Petitioner and respondents by U.S. Mail, First Class, postage pre-paid, addressed as follows:

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Mark S. Frank, Esquire Anderson, Frank and Steiner 2300 Grant Building Pittsburgh, PA 15219	Respondent Fred Baker

Samuel W. Brown